

1 ENRIQUE MARINEZ (SBN 160956)
2 ROPERS, MAJESKI, KOHN & BENTLEY
3 1001 Marshall Street, Suite 500
4 Redwood City, CA 94063-2052
5 Telephone: (650) 364-8200
6 Facsimile: (650) 780-1701
7 Email: emarinez@rmkb.com

5 GEOFFREY W. HEINEMAN (*pro hac*)
6 KIRSTEN M. LEE (*pro hac*)
7 ROPERS, MAJESKI, KOHN & BENTLEY
8 750 Third Avenue, 25th Floor
9 New York, NY 10017
10 Telephone: (212) 668-5927
11 Facsimile: (212) 668-5929
12 Email: gheineman@rmkb.com
klee@rmkb.com

13 Attorneys for Defendant
14 ENDURANCE AMERICAN SPECIALTY
15 INSURANCE CO.

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA

18 PCCP, LLC and REDWOOD CAPITAL
19 FINANCE COMPANY, LLC

20 Plaintiffs,

21 v.

22 ENDURANCE AMERICAN SPECIALTY
23 INSURANCE CO.; and DOES 1 through
24 20,

25 Defendants.

26 CASE NO. C 12-00447 YGR

27 **STIPULATED PROTECTIVE ORDER (AS
28 MODIFIED IN PARAGRAPH 6.3)**

29 1. **PURPOSES AND LIMITATIONS**

30 Disclosure and discovery activity in this action are likely to involve production of
31 confidential, proprietary, or private information for which special protection from public
32 disclosure and from use for any purpose other than prosecuting this litigation may be warranted.
33 Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated
34

1 Protective Order. The parties acknowledge that this Order does not confer blanket protections on
 2 all disclosures or responses to discovery and that the protection it affords from public disclosure
 3 and use extends only to the limited information or items that are entitled to confidential treatment
 4 under the applicable legal principles. The parties further acknowledge, as set forth in Section
 5 12.3, below, that this Stipulated Protective Order does not entitle them to file confidential
 6 information under seal; Civil Local Rule 79-5 and General Order 62 set forth the procedures that
 7 must be followed and the standards that will be applied when a party seeks permission from the
 8 court to file material under seal.

9 2. DEFINITIONS

10 2.1 Challenging Party: a Party or Non-Party that challenges the designation of
 11 information or items under this Order.

12 2.2 “CONFIDENTIAL” Information or Items: information (regardless of how it is
 13 generated, stored or maintained) or tangible things that qualify for protection under Federal Rule
 14 of Civil Procedure 26(c).

15 2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as
 16 well as their support staff).

17 2.4 Designating Party: a Party or Non-Party that designates information or items that
 18 it produces in disclosures or in responses to discovery as “CONFIDENTIAL.”

19 2.5 Disclosure or Discovery Material: all items or information, regardless of the
 20 medium or manner in which it is generated, stored, or maintained (including, among other things,
 21 testimony, transcripts, and tangible things), that are produced or generated in disclosures or
 22 responses to discovery in this matter.

23 2.6 Expert: a person with specialized knowledge or experience in a matter pertinent to
 24 the litigation who has been retained by a Party or its counsel to serve as an expert witness or as a
 25 consultant in this action.

26 2.7 House Counsel: attorneys who are employees of a party to this action. House
 27 Counsel does not include Outside Counsel of Record or any other outside counsel.

1 2.8 Non-Party: any natural person, partnership, corporation, association, or other legal
2 entity not named as a Party to this action.

3 2.9 Outside Counsel of Record: attorneys who are not employees of a party to this
4 action but are retained to represent or advise a party to this action and have appeared in this action
5 on behalf of that party or are affiliated with a law firm which has appeared on behalf of that party.

6 2.10 Party: any party to this action, including all of its officers, directors, employees,
7 consultants, retained experts, and Outside Counsel of Record (and their support staffs).

8 2.11 Producing Party: a Party or Non-Party that produces Disclosure or Discovery
9 Material in this action.

10 2.12 Professional Vendors: persons or entities that provide litigation support services
11 (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and
12 organizing, storing, or retrieving data in any form or medium) and their employees and
13 subcontractors.

14 2.13 Protected Material: any Disclosure or Discovery Material that is designated as
15 "CONFIDENTIAL."

16 2.14 Receiving Party: a Party that receives Disclosure or Discovery Material from a
17 Producing Party.

18 3. SCOPE

19 The protections conferred by this Stipulation and Order cover not only Protected Material
20 (as defined above), but also (1) any information copied or extracted from Protected Material; (2)
21 all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony,
22 conversations, or presentations by Parties or their Counsel that might reveal Protected Material.
23 However, the protections conferred by this Stipulation and Order do not cover the following
24 information: (a) any information that is in the public domain at the time of disclosure to a
25 Receiving Party or becomes part of the public domain after its disclosure to a Receiving Party as
26 a result of publication not involving a violation of this Order, including becoming part of the
27 public record through trial or otherwise; and (b) any information known to the Receiving Party

1 prior to the disclosure or obtained by the Receiving Party after the disclosure from a source who
2 obtained the information lawfully and under no obligation of confidentiality to the Designating
3 Party. Any use of Protected Material at trial shall be governed by a separate agreement or order.

4. **DURATION**

5 Even after final disposition of this litigation, the confidentiality obligations imposed by
6 this Order shall remain in effect until a Designating Party agrees otherwise in writing or a court
7 order otherwise directs. Final disposition shall be deemed to be the later of (1) dismissal of all
8 claims and defenses in this action, with or without prejudice; and (2) final judgment herein after
9 the completion and exhaustion of all appeals, rehearings, remands, trials, or reviews of this action,
10 including the time limits for filing any motions or applications for extension of time pursuant to
11 applicable law.

12. **DESIGNATING PROTECTED MATERIAL**

13. 5.1 **Exercise of Restraint and Care in Designating Material for Protection.** Each Party
14 or Non-Party that designates information or items for protection under this Order must take care
15 to limit any such designation to specific material that qualifies under the appropriate standards.
16 The Designating Party must designate for protection only those parts of material, documents,
17 items, or oral or written communications that qualify – so that other portions of the material,
18 documents, items, or communications for which protection is not warranted are not swept
19 unjustifiably within the ambit of this Order.

20 Mass, indiscriminate, or routinized designations are prohibited. Designations that are
21 shown to be clearly unjustified or that have been made for an improper purpose (e.g., to
22 unnecessarily encumber or retard the case development process or to impose unnecessary
23 expenses and burdens on other parties) expose the Designating Party to sanctions.

24 If it comes to a Designating Party's attention that information or items that it designated
25 for protection do not qualify for protection, that Designating Party must promptly notify all other
26 Parties that it is withdrawing the mistaken designation.

1 5.2 Manner and Timing of Designations. Except as otherwise provided in this Order
 2 (see, e.g., second paragraph of section 5.2(a) below), or as otherwise stipulated or ordered,
 3 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so
 4 designated before the material is disclosed or produced.

5 Designation in conformity with this Order requires:

6 (a) for information in documentary form (e.g., paper or electronic documents,
 7 but excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing
 8 Party affix the legend “CONFIDENTIAL” to each page that contains protected material. If only a
 9 portion or portions of the material on a page qualifies for protection, the Producing Party also
 10 must clearly identify the protected portion(s) (e.g., by making appropriate markings in the
 11 margins).

12 A Party or Non-Party that makes original documents or materials available for inspection
 13 need not designate them for protection until after the inspecting Party has indicated which
 14 material it would like copied and produced. During the inspection and before the designation, all
 15 of the material made available for inspection shall be deemed “CONFIDENTIAL.” After the
 16 inspecting Party has identified the documents it wants copied and produced, the Producing Party
 17 must determine which documents, or portions thereof, qualify for protection under this Order.
 18 Then, before producing the specified documents, the Producing Party must affix the
 19 “CONFIDENTIAL” legend to each page that contains Protected Material. If only a portion or
 20 portions of the material on a page qualifies for protection, the Producing Party also must clearly
 21 identify the protected portion(s) (e.g., by making appropriate markings in the margins).

22 (b) for testimony given in deposition or in other pretrial or trial proceedings,
 23 that the Designating Party identify on the record, before the close of the deposition, hearing, or
 24 other proceeding, all protected testimony.

25 (c) for information produced in some form other than documentary and for any
 26 other tangible items, that the Producing Party affix in a prominent place on the exterior of the
 27 container or containers in which the information or item is stored the legend “CONFIDENTIAL.”

1 If only a portion or portions of the information or item warrant protection, the Producing Party, to
2 the extent practicable, shall identify the protected portion(s).

3 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
4 designate qualified information or items does not, standing alone, waive the Designating Party's
5 right to secure protection under this Order for such material. Upon timely correction of a
6 designation, the Receiving Party must make reasonable efforts to assure that the material is
7 treated in accordance with the provisions of this Order.

8 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

9 6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of
10 confidentiality at any time. Unless a prompt challenge to a Designating Party's confidentiality
11 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
12 burdens, or a significant disruption or delay of the litigation, a Party does not waive its right to
13 challenge a confidentiality designation by electing not to mount a challenge promptly after the
14 original designation is disclosed.

15 6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution
16 process by providing written notice of each designation it is challenging and describing the basis
17 for each challenge. To avoid ambiguity as to whether a challenge has been made, the written
18 notice must recite that the challenge to confidentiality is being made in accordance with this
19 specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge in
20 good faith and must begin the process by conferring directly (in voice to voice dialogue; other
21 forms of communication are not sufficient) within 14 days of the date of service of notice. In
22 conferring, the Challenging Party must explain the basis for its belief that the confidentiality
23 designation was not proper and must give the Designating Party an opportunity to review the
24 designated material, to reconsider the circumstances, and, if no change in designation is offered,
25 to explain the basis for the chosen designation. A Challenging Party may proceed to the next
26 stage of the challenge process only if it has engaged in this meet and confer process first or
27
28

1 establishes that the Designating Party is unwilling to participate in the meet and confer process in
2 a timely manner.

3 6.3 Judicial Intervention. If the Parties cannot resolve a challenge without court
4 intervention, the parties shall follow the Court's Standing Order in Civil Cases regarding
5 Discovery and Discovery Motions. The parties may file a joint letter brief regarding retaining
6 confidentiality within 21 days of the initial notice of challenge or within 14 days of the parties
7 agreeing that the meet and confer process will not resolve their dispute, whichever is earlier.
8 Failure by a Designating Party to file such discovery dispute letter within the applicable 21 or 14
9 day period (set forth above) with the Court shall automatically waive the confidentiality
10 designation for each challenged designation. If, after submitting a joint letter brief, the Court
11 allows that a motion may be filed, any such motion must be accompanied by a competent
12 declaration affirming that the movant has complied with the meet and confer requirements
13 imposed in the preceding paragraph. The Court, in its discretion, may elect to transfer the
14 discovery matter to a Magistrate Judge.

15 In addition, the parties may file a joint letter brief regarding a challenge to a
16 confidentiality designation at any time if there is good cause for doing so, including a challenge to
17 the designation of a deposition transcript or any portions thereof. If, after submitting a joint letter
18 brief, the Court allows that a motion may be filed, any motion brought pursuant to this provision
19 must be accompanied by a competent declaration affirming that the movant has complied with the
20 meet and confer requirements imposed by the preceding paragraph. The Court, in its discretion,
21 may elect to transfer the discovery matter to a Magistrate Judge.

22 The burden of persuasion in any such challenge proceeding shall be on the Designating
23 Party. Frivolous challenges, and those made for an improper purpose (e.g., to harass or impose
24 unnecessary expenses and burdens on other parties) may expose the Challenging Party to
25 sanctions. Unless the Designating Party has waived the confidentiality designation by failing to
26 file letter brief to retain confidentiality as described above, all parties shall continue to afford the
27
28

1 material in question the level of protection to which it is entitled under the Producing Party's
2 designation until the court rules on the challenge.

3 **7. ACCESS TO AND USE OF PROTECTED MATERIAL**

4 7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed or
5 produced by another Party or by a Non-Party in connection with this case only for prosecuting,
6 defending, or attempting to settle this litigation. Such Protected Material may be disclosed only to
7 the categories of persons and under the conditions described in this Order. When the litigation has
8 been terminated, a Receiving Party must comply with the provisions of section 13 below (FINAL
9 DISPOSITION).

10 Protected Material must be stored and maintained by a Receiving Party at a location and
11 in a secure manner that ensures that access is limited to the persons authorized under this Order.

12 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise ordered
13 by the court or permitted in writing by the Designating Party, a Receiving Party may disclose any
14 information or item designated "CONFIDENTIAL" only to:

15 (a) the Receiving Party's Outside Counsel of Record in this action, as well as
16 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the
17 information for this litigation and who have signed the "Acknowledgment and Agreement to Be
18 Bound" that is attached hereto as Exhibit A;

19 (b) the officers, directors, and employees (including House Counsel) of the
20 Receiving Party to whom disclosure is reasonably necessary for this litigation and who have
21 signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);

22 (c) Experts (as defined in this Order) of the Receiving Party to whom
23 disclosure is reasonably necessary for this litigation and who have signed the "Acknowledgment
24 and Agreement to Be Bound" (Exhibit A);

25 (d) the court and its personnel;

26 (e) court reporters and their staff, professional jury or trial consultants, mock
27 jurors, and Professional Vendors to whom disclosure is reasonably necessary for this litigation

1 and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

2 (f) during their depositions, witnesses in the action to whom disclosure is
3 reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound”
4 (Exhibit A), unless otherwise agreed by the Designating Party or ordered by the court. Pages of
5 transcribed deposition testimony or exhibits to depositions that reveal Protected Material must be
6 separately bound by the court reporter and may not be disclosed to anyone except as permitted
7 under this Stipulated Protective Order.

8 (g) the author or recipient of a document containing the information or a
9 custodian or other person who otherwise possessed or knew the information.

10 8. **PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER**
11 **LITIGATION**

12 If a Party is served with a subpoena or a court order issued in other litigation that compels
13 disclosure of any information or items designated in this action as “CONFIDENTIAL,” that Party
14 must:

15 (a) promptly notify in writing the Designating Party. Such notification shall
16 include a copy of the subpoena or court order;

17 (b) promptly notify in writing the party who caused the subpoena or order to
18 issue in the other litigation that some or all of the material covered by the subpoena or order is
19 subject to this Protective Order. Such notification shall include a copy of this Stipulated
20 Protective Order; and

21 (c) cooperate with respect to all reasonable procedures sought to be pursued by
22 the Designating Party whose Protected Material may be affected.

23 If the Designating Party timely seeks a protective order, the Party served with the
24 subpoena or court order shall not produce any information designated in this action as
25 “CONFIDENTIAL” before a determination by the court from which the subpoena or order
26 issued, unless the Party has obtained the Designating Party’s permission. The Designating Party
27 shall bear the burden and expense of seeking protection in that court of its confidential material –
28

1 and nothing in these provisions should be construed as authorizing or encouraging a Receiving
2 Party in this action to disobey a lawful directive from another court.

3 **9. A NON-PARTY'S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN THIS**
4 **LITIGATION**

5 (a) The terms of this Order are applicable to information produced by a Non-
6 Party in this action and designated as "CONFIDENTIAL." Such information produced by Non-
7 Parties in connection with this litigation is protected by the remedies and relief provided by this
8 Order. Nothing in these provisions should be construed as prohibiting a Non-Party from seeking
9 additional protections.

10 (b) In the event that a Party is required, by a valid discovery request, to
11 produce a Non-Party's confidential information in its possession, and the Party is subject to an
12 agreement with the Non-Party not to produce the Non-Party's confidential information, then the
13 Party shall:

14 (1) promptly notify in writing the Requesting Party and the Non-Party
15 that some or all of the information requested is subject to a confidentiality agreement with a Non-
16 Party;

17 (2) promptly provide the Non-Party with a copy of the Stipulated
18 Protective Order in this litigation, the relevant discovery request(s), and a reasonably specific
19 description of the information requested; and

20 (3) make the information requested available for inspection by the
21 Non-Party.

22 (c) If the Non-Party fails to object or seek a protective order from this court
23 within 14 days of receiving the notice and accompanying information, the Receiving Party may
24 produce the Non-Party's confidential information responsive to the discovery request. If the Non-
25 Party timely seeks a protective order, the Receiving Party shall not produce any information in its
26 possession or control that is subject to the confidentiality agreement with the Non-Party before a
27
28

1 determination by the court.¹ Absent a court order to the contrary, the Non-Party shall bear the
 2 burden and expense of seeking protection in this court of its Protected Material.

3 **10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

4 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed Protected
 5 Material to any person or in any circumstance not authorized under this Stipulated Protective
 6 Order, the Receiving Party must immediately (a) notify in writing the Designating Party of the
 7 unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the
 8 Protected Material, (c) inform the person or persons to whom unauthorized disclosures were
 9 made of all the terms of this Order, and (d) request such person or persons to execute the
 10 “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

11 **11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED**
 12 **MATERIAL**

13 When a Producing Party gives notice to Receiving Parties that certain inadvertently
 14 produced material is subject to a claim of privilege or other protection, the obligations of the
 15 Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This
 16 provision is not intended to modify whatever procedure may be established in an e-discovery
 17 order that provides for production without prior privilege review. Pursuant to Federal Rule of
 18 Evidence 502(d) and (e), insofar as the parties reach an agreement on the effect of disclosure of a
 19 communication or information covered by the attorney-client privilege or work product
 20 protection, the parties may incorporate their agreement in the stipulated protective order
 21 submitted to the court.

22 **12. MISCELLANOUS**

23 **12.1 Right to Further Relief.** Nothing in this Order abridges the right of any person to
 24 seek its modification by the court in the future.

25 **12.2 Right to Assert Other Objections.** By stipulating to the entry of this Protective
 26 Order no Party waives any right it otherwise would have to object to disclosing or producing any

27
 28 ¹ The purpose of this provision is to alert the interested parties to the existence of confidentiality rights of a Non-
 Party and to afford the Non-Party an opportunity to protect its confidentiality interests in this court.

1 information or item on any ground not addressed in this Stipulated Protective Order. Similarly, no
2 Party waives any right to object on any ground to use in evidence of any of the material covered
3 by this Protective Order.

4 12.3 Filing Protected Material. Without written permission from the Designating Party
5 or a court order secured after appropriate notice to all interested persons, a Party may not file in
6 the public record in this action any Protected Material. A Party that seeks to file under seal any
7 Protected Material must comply with Civil Local Rule 79-5 and General Order 62. Protected
8 Material may only be filed under seal pursuant to a court order authorizing the sealing of the
9 specific Protected Material at issue. Pursuant to Civil Local Rule 79-5 and General Order 62, a
10 sealing order will issue only upon a request establishing that the Protected Material at issue is
11 privileged, protectable as a trade secret, or otherwise entitled to protection under the law. If a
12 Receiving Party's request to file Protected Material under seal pursuant to Civil Local Rule 79-
13 5(d) and General Order 62 is denied by the court, then the Receiving Party may file the
14 information in the public record pursuant to Civil Local Rule 79-5(e) unless otherwise instructed
15 by the court.

16 13. FINAL DISPOSITION

17 Within 60 days after the final disposition of this action, as defined in paragraph 4, each
18 Receiving Party must return all Protected Material to the Producing Party or destroy such
19 material. As used in this subdivision, "all Protected Material" includes all copies, abstracts,
20 compilations, summaries, and any other format reproducing or capturing any of the Protected
21 Material. Whether the Protected Material is returned or destroyed, the Receiving Party must
22 submit a written certification to the Producing Party (and, if not the same person or entity, to the
23 Designating Party) by the 60 day deadline that (1) identifies (by category, where appropriate) all
24 the Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has
25 not retained any copies, abstracts, compilations, summaries or any other format reproducing or
26 capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to
27 retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts,

1 legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work
2 product, and consultant and expert work product, even if such materials contain Protected
3 Material. Any such archival copies that contain or constitute Protected Material remain subject to
4 this Protective Order as set forth in Section 4 (DURATION).

5 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

6 Dated: February 28, 2013

SHARTSIS FRIESE LLP

8 By: /s/ Anthony B. Leuin
9 ANTHONY B. LEUIN
10 FELICIA A. DRAPER
11 Attorneys for Plaintiffs
PCCP, LLC & REDWOOD CAPITAL
FINANCE COMPANY, LLC

12 Dated: February 28, 2013

13 ROPERS, MAJESKI, KOHN & BENTLEY

14
15 By: /s/ Geoffrey W. Heineman
16 GEOFFREY W. HEINEMAN
17 ENRIQUE MARINEZ
18 KIRSTEN M. LEE
19 Attorneys for Defendant
ENDURANCE AMERICAN SPECIALTY
INSURANCE CO.

20 PURSUANT TO STIPULATION, IT IS SO ORDERED.

21
22 DATED: March 13, 2013


23 Hon. Yvonne Gonzalez Rogers
United States District Judge

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of _____
[print or type full address], declare under penalty of perjury that I have read in its entirety and
understand the Stipulated Protective Order that was issued by the United States District Court for
the Northern District of California on _____ [date] in the case of *PCCP, LLC et al.*
v. Endurance American Specialty Insurance Co., Case No. C12-00447 YGR. I agree to comply
with and to be bound by all the terms of this Stipulated Protective Order and I understand and
acknowledge that failure to so comply could expose me to sanctions and punishment in the nature
of contempt. I solemnly promise that I will not disclose in any manner any information or item
that is subject to this Stipulated Protective Order to any person or entity except in strict
compliance with the provisions of this Order.

13 I further agree to submit to the jurisdiction of the United States District Court for the
14 Northern District of California for the purpose of enforcing the terms of this Stipulated Protective
15 Order, even if such enforcement proceedings occur after termination of this action.

I hereby appoint _____ [print or type full name] of
_____ [print or type full address and telephone
number] as my California agent for service of process in connection with this action or any
proceedings related to enforcement of this Stipulated Protective Order.

20 Date:

21 City and State where sworn and signed:

22 Printed name:

23 ||

24 || Signature:

25 ||